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MARY A. MURPHY, d.b.a. ALEX PICKERING TRANSFER COMPANY, and PICKERING TRANSFER COMPANY, INC., a Utah corporation, v. PUBLIC SERVICE COMMISSION OF UTAH, REDMAN VAN & STORAGE COMPANY, BARTON TRUCK LINE, INC., UINTAH FREIGHTWAYS, MAGNA - G A R F I E LD TRUCK LINE, PALMER BROTHERS, INC., RIO GRANDE MOTOR WAY, INC., MILNE TRUCK LINES, INC., ASHWORTH TRANSFER, INC., BILLS MOVING, INC., A-ONE MOVING AND DELIVERY, LEWIS BROS. STAGE LINES, and

UTAH PACKAGE EXPRESS, INC : Brief of Defendants

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

MARY A. MURPHY, d.b.a. ALEX PICKERING TRANSFER COMPANY, and PICKERING TRANSFER COMPANY, INC., a Utah corporation,

Plaintiffs,

vs.

PUBLIC SERVICE COMMISSION OF UTAH, REDMAN VAN & STORAGE COMPANY, BARTON TRUCK LINE, INC., UINTAH FREIGHTWAYS, MAGNA-GARFIELD TRUCK LINE, PALMER BROTHERS, INC., RIO GRANDE MOTOR WAY, INC., MILNE TRUCK LINES, INC., ASHWORTH TRANSFER, INC., BILLS MOVING, INC., A-ONE MOVING AND DELIVERY, LEWIS BROS. STAGE LINES, and UTAH PACKAGE EXPRESS, INC.,

Defendants.

Case No. 13926

BRIEF OF DEFENDANTS

Appeal from the Order of the
Public Service Commission of Utah

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Defendants.

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BRIEF OF DEFENDANTS

This brief is submitted in behalf of the defendant, Public Service Commission and all other named defendants. The defendant Public Service Commission of Utah will be referred to herein as "Commission". The

other named defendants will sometimes be referred to herein as "protesting motor carriers" or "defendants". The respective plaintiffs herein will be referred to as "Mary A. Murphy" and "Pickering Transfer Company, Inc." and will sometimes be collectively referred to as "plaintiffs."

STATEMENT OF THE CASE

This is an action before the Public Service Commission to transfer a common motor carrier certificate of public convenience and necessity and a contract motor carrier permit.

DISPOSITION BY THE PUBLIC SERVICE COMMISSION OF UTAH

The Commission in its Order under date of October 30, 1974, denied the application of plaintiffs to transfer the contract motor carrier permit of Mary A. Murphy to Pickering Transfer Co., Inc. The Commission also denied, without prejudice, that part of the application by which plaintiffs sought to transfer the separate certificate of public convenience and necessity.

RELIEF SOUGHT ON APPEAL

The plaintiffs pray that the Commission's Order under date of October 30, 1974, be reversed and remanded with direction that the transfer application be approved. The defendants urge the Court to sustain the Commission's Order.

STATEMENT OF FACTS

Mary A. Murphy presently holds operating authority from the Commission both as a common and as a contract motor carrier. Even though protestants indicated initially they were not challenging the transfer of the certificate of public convenience and necessity as alleged by plaintiffs on page 5 of their brief, said protestants after hearing the evidence, and prior to the conclusion of the hearing on April 6, 1973, challenged the fitness of plaintiff to hold any authority from the Commission and protested the transfer of authority (R. 186, 190-191).

The common motor carrier authority generally authorizes the transportation of general commodities as a cartage carrier between specified points in Salt Lake and Davis Counties, Utah. The contract motor carrier authority of Mary A. Murphy authorizes *her* to transport commodities as follows:

> "*Contract Carrier Permit No.* 130
>
> To operate as a contract motor carrier of all kinds of personal property including merchandise, machinery, and other property which *she* has occasion to carry in the course of the conduct of her said transportation business within a 50-mile radius of Salt Lake City, excluding pickup and delivery service within the area described in Certificate of Convenience and Necessity No. 684" (R. 55). (Emphasis added.)

The scope of the contract motor carrier authority was recently interpreted by this Court in *Murphy* v.

Public Service Commission, 30 Utah 2d 140, 514 P. 2d 804 (1973) (R. 85-87). The court did not have before it issues involving the transfer of contract carrier permits.

On February 9, 1973, an application was filed with the Commission by Mary A. Murphy and Pickering Transfer Company, Inc. whereby Pickering Transfer Company, Inc. sought to acquire all the operating authority of Mary A. Murphy pursuant to a contract between Mary A. Murphy and Max W. Young. Effectively, the agreement between Max W. Young and Mary A. Murphy, et al., divested Mary A. Murphy, Paul J. Murphy and Charles E. Murphy from any interest whatsoever in Mary A. Murphy, d.b.a. Pickering Transfer Company effective March 1, 1972. From that day forward, the said Mary A. Murphy and her sons were insulated against liability and deprived of profits. As a consideration, Mary A. Murphy and her two sons, received a down payment of $5,000 cash and were entitled to monthly payments of $300 each month commencing April 1, 1972, and for a period not to exceed 28 months. In addition, a payment of $10,000 is due upon final approval of the transfer of all authorities. In the event the Commission does not approve the transfer of the contract carrier permit, the remaining $10,000 shall not be paid (Ex. 4). Effectively, Mary A. Murphy and her sons have been fully paid for the certificates of public convenience and necessity and equipment.

The application was duly processed by the Commission and set for hearing on April 6, 1973 (R. 14). The

protesting motor carriers who are now the defendants herein appeared at said hearing to contest the transfer application (R. 13).

At the hearing on April 6, 1973, a statement was made by the witness Max W. Young as General Manager for Mary A. Murphy that he had read the application and that the application stated his testimony (R. 161). The applicant introduced a profit and loss statement covering the period January 1, 1973 to February 28, 1973, (R. 66), a balance sheet as of February 28, 1973, (R. 67), and an equipment list (R. 66A). In addition, the applicants asked the Commission to take official notice of the profit and loss statement filed as a part of the annual report of Mary A. Murphy to the Commission for the year 1972 (R. 163). The financial statements and the equipment list represented the financial condition and equipment of the transferror Mary A. Murphy and not the financial condition or the equipment of the transferee, Pickering Transfer Company, Inc. In an effort to correct this defect, applicants' counsel asked that those exhibits be treated as the pro forma financial statements and equipment list for the corporation, Pickering Transfer Company, Inc. Said exhibits were received on stipulation of counsel (R. 197).

No agreement for the purchase and sale between Mary A. Murphy and Pickering Transfer Company, Inc. was offered in evidence. The only agreement offered was a contract of purchase between Max W. Young and

Mary A. Murphy, which contract was identified as Exhibit 4 (R. 5-10).

No contract shipper appeared in support of the applicant, Pickering Transfer Company, Inc., nor was any contract offered disclosing the willingness of any person to contract with the proposed transferee, Pickering Transfer Company, Inc. The only schedule of rates and charges received in evidence was a schedule of rates and charges filed with the Commission on December 23, 1974 naming rates and charges for the accounts of Campbell Soup Company and Industrial Supply Company.

The only evidence offered concerning any service provided by Mary A. Murphy was the testimony of Max W. Young relating to service performed for Campbell Soup Company. Under oath, Mr. Young testified that said service was performed in intrastate commerce pursuant to contract motor carrier permit No. 130 (R. 163, 164-172, 180-185). On April 16, 1973, Max W. Young filed an affidavit with the Commission correcting his testimony of April 6, 1973 and disclaiming any intrastate service by Mary A. Murphy for the account of Campbell Soup Company for the year 1972 (R. 19-20).

On December 3, 1973, the protesting motor carriers filed their Petition to Reopen and for Further Hearing with the Commission. The petition was based, among other things, on a material change of circumstances resulting from the decision in Case No. 12920 of this Court which interpreted the scope of Mary A. Murphy's con-

tract carrier permit (R. 21-24). On January 31, 1974, the Commission ordered that said petition be served on all parties and that all parties desiring to do so submit memorandums and briefs to the Commission on or before February 15, 1974, with respect to said petition (R. 25). Responsive documents were subsequently filed with the Commission by counsel for plaintiffs and counsel for defendants.

On July 9, 1974, the Commission served its Order granting the petition to reopen the proceeding and setting the date of July 26, 1974 for further hearing. On said date, the Commission heard argument from counsel on both sides with respect to a motion to dismiss the application and the burden of proof to be met by the applicants. The Commission took administrative notice of the Supreme Court ruling in Case No. 12920. Subject to certain objections reserved by applicants' counsel, the parties stipulated that each of the protesting motor carriers could establish through testimony and documentary evidence that they had each made substantial investments in plant and equipment to serve the territory which is involved in the contract carrier permit of Mary A. Murphy; that each protestant depends upon traffic originating within that same area to support the remaining territory served by each of them; and that if the contract carrier permit of Mary A. Murphy were transferred, that each of the protesting motor carriers would be materially and adversely affected (R. 222). The Commission subsequently took administrative notice of the

annual reports of Mary A. Murphy and contracts filed through July 26, 1974 (R. 223).

On October 30, 1974, the Commission issued its Report and Order wherein it reviewed the entire record and the applicable law. In said Report and Order the Commission concluded that the applicants had not met their burden of proof and that the transfer of the contract carrier permit from Mary A. Murphy to Pickering Transfer Company, Inc. should be denied. The Commission went on to explain that it could not determine the fitness and ability of the proposed transferee based on the record before it. Further, the Commission said that since there was no agreement between the transferror and the transferee, it could not determine the value of the certificate apart from the value of the contract carrier permit and therefore could not separately transfer the certificate based on the record before it (R. 54-56).

The applicants subsequently filed a petition for rehearing which was denied by the Commission on December 6, 1974 (R. 64).

ARGUMENT

POINT I.

THE COMMISSION PROPERLY DENIED THE PROPOSED TRANSFER OF THE CONTRACT CARRIER PERMIT OF MARY A. MURPHY TO PICKERING TRANSFER COMPANY, INC. BECAUSE THE APPLI-

CANTS FAILED TO SATISFY THE MINIMUM STATUTORY AND REGULATORY REQUIREMENTS.

In its decision under date of October 30, 1974, the Commission concluded as follows:

> "Rule No. 2 [II] of the *Motor Carrier Rules and Regulations* effective June 1, 1937, which deals with certificates of public convenience and necessity, together with case law expressly state and hold that a person desiring to assume the operating rights of someone else 'will not be required to prove public convenience and necessity.' Rule No. 3 [III] of the *Motor Carrier Rules and Regulations*, which rule specifically deals with permits, expressly provides, 'the person desiring to assume said operating rights shall comply with the provisions of Chapter 65, *Laws of Utah*, 1935, as in filing for a new permit.' We are of the opinion that the Commission's rules, except where expressly modified, are still in full force and effect. In fact, the validity of said rules were not challenged and were expressly referred to by the court in the case of *Murphy* v. *Public Service Commission of Utah*, supra. *Critical to the transfer of a contract carrier permit is the introduction by applicant of evidence that the grant of the application will not be detrimental to the best interests of the people of the State of Utah and/or to the localities to be served. Additionally, applicants must demonstrate that existing transportation facilities do not provide adequate or reasonable service.* Applicants have not met their burden of proof and the transfer of the contract carrier permit

> from Mary A. Murphy, dba Alex Pickering Transfer, to Pickering Transfer Company, Inc. should be denied" (R. 56). [Emphasis and bracketed information added.]

The Commission properly concluded that the applicants had not met their burden of proof in order to transfer the contract carrier permit of Mary A. Murphy to Pickering Transfer Company, Inc. The record before the Commission is seriously deficient in two particular respects in that the applicant did not demonstrate that 1) transfer of the contract carrier permit would not be detrimental to the best interests of the people of the State of Utah and/or the localities to be served and 2) that existing transportation facilities do not provide adequate or reasonable service.

The Commission adhered to its *Motor Carrier Rules and Regulations No.* 3 issued June 1, 1937 in reaching its decision. The full text of these regulations is set forth as Exhibit 37 in the Special Record in this proceeding. The Commission is authorized to issue such regulations by virtue of Section 54-6-11, *Utah Code Annotated*, 1953, which provides:

> "Powers of commission. — The commission is hereby vested with power and authority and it may supervise and regulate every contract motor carrier in this state and fix and approve reasonable maximum or minimum rates, fares, charges and classifications, and to adopt reasonable rules and regulations pertaining to all such motor carriers."

Rule No. III of the Commission's *Motor Carrier Rules and Regulations No.* 3 governs the transfer of contract carrier permits. The pertinent portions of Rule III provide as follows:

> "(d) In the event a person operating under a permit issued by the Commission enters into an agreement with another person to sell, assign, or transfer the operating rights covered by said permit the following procedure shall be followed before the Commission:
>
> "A joint application shall be filed by the persons involved which application shall request authority for the one person to discontinue operations as a motor carrier and for the other person to assume and take over said operations as a motor carrier. The person desiring to assume said operating rights shall comply with the provisions of Chapter 65, Laws of Utah, 1935, as in filing for a new permit."

The applicable provision of Chapter 65 of the *Laws of Utah*, 1935, to which the regulation refers is Section 9 which provides in part:

> "* * * The commission upon the filing of an application for a contract motor carrier's permit by any other person than those referred to above in this section shall fix a time and place for hearing thereon and shall give the same notice as provided in section 6 hereof. The commission shall also subpoena a member of the state road commission to be present at said hearing and said member or representative designated by said road commission shall offer testi-

> mony as to the character of the highway over which said contract motor carrier proposes to operate and the effect thereon; and upon the traveling public using the same. If, from all the testimony offered at said hearing, the commission shall determine that the highways over which the applicant desires to operate are not unduly burdened; that the granting of the application will not unduly interfere with the traveling public; and that the granting of the application will not be detrimental to the best interest of the people of the state of Utah and/or to the localities to be served, the commission shall grant such permit; * * *."

In order to understand the full meaning of Section 9, Chapter 65, *Laws of Utah*, 1935, it is necessary to examine the statutory history of the section in order to determine the criteria by which the Commission is to operate pursuant to its Rule III with respect to the transfer of contract motor carrier permits.

The predecessor statute to Section 9, Chapter 65, *Laws of Utah*, 1935, is Section 13, Chapter 53, *Laws of Utah*, 1933. Section 13 provides in pertinent part:

> "* * * Before granting a permit to a contract motor carrier, the commission shall take into consideration the character of the highway over which said contract motor carrier proposes to operate, and the effect thereon, and upon the traveling public using the same and also other existing transportation facilities and whether or not there is any real necessity for the service proposed to be rendered, and if it appears from the evidence that the highway is, in the opinion

> of the commission, already unduly burdened with traffic and that additional traffic will unduly interfere with the traveling public, or that the service furnished by the existing transportation facilities is reasonably adequate and that there is no real need for any additional transportation facilities, the commission shall not grant such permit. * * *"

Section 13, Chapter 53, *Laws of Utah*, 1933, contains an additional criterion not expressly found in Section 9, Chapter 65, *Laws of Utah*, 1935. That criterion is the adequacy of existing transportation facilities. However, as will be explained below, that criterion is necessarily implied in the best interests test found in Section 9, Chapter 65, *Laws of Utah*, 1935.

Section 9, Chapter 65, *Laws of Utah*, 1935, was carried forward into the *Utah Code* of 1943 as Section 76-5-21 without change.

In 1945, Section 76-5-21, *Utah Code* of 1943, was amended to expresly include the criterion of adequacy of existing transportation facilities, which criterion had apparently been inadvertently omitted from Section 9, Chapter 65, *Laws of Utah*, 1935, when Chapter 53, *Laws of Utah*, 1933, was revised. Section 76-5-21, *Utah Code*, 1943, following amendment, read in pertinent part, as follows:

> "* * * The commission upon the filing of an application for a contract motor carrier's permit shall fix a time and place for hearing thereon and may give the same notice as provided in sec-

> tion 76-5-18 hereof. If, from all the testimony offered at said hearing, the commission shall determine that the highways over which the applicant desires to operate are not unduly burdened; that the granting of the application will not unduly interfere with the traveling public; and that the granting of the application will not be detrimental to the best interests of the people of the state of Utah and/or to the localities to be served, and if the existing transportation facilities do not provide adequate or reasonable service, the commission shall grant such permit."

Section 76-5-21, *Utah Code*, 1943 (as amended) was carried forward without change as Section 54-6-8, *Utah Code Annotated*, 1953.

Plaintiffs contend that the Commission erred in incorporating the adequacy of existing transportation facilities test as a part of its decision. Plaintiffs contend that the Commission should have strictly applied its Rule III as the same refers literally to "Chapter 65, *Laws of Utah*, 1935, as in filing for a new permit." Plaintiffs' evidence was so inadequate that it did not even meet the requirements of Chapter 65, *Laws of Utah*, 1935. Regardless, the Commission properly applied the current statutory criteria as the same are presently embodied in Section 54-6-8, *Utah Code Annotated*, 1953.

The Commission is an administrative body created by the Legislature to supervise and regulate, as here pertinent, the transportation of property by motor vehicle within the State. *Rowley* v. *Public Service Commission, et al.*, 112 Utah 116, 122, 185 P. 2d 514 (1947).

As the servant of the Legislature, any rules and regulations of the Commission must be in accord with and not exceed the bounds of the statutes from which its authority is derived. While Rule III of the Commission's regulations has not been amended since 1937, the body of law to which it makes reference, Chapter 65, *Laws of Utah*, 1935, has been amended by the Legislature. The United States Supreme Court has previously held that an administrative agency's interpretation of its own regulation is controlling unless it is plainly erroneous or inconsistent with the regulation. *Immigration and Naturalization Service* v. *Stanisic*, 395 U. S. 62, 23 L. Ed. 2d 101, 89 S. Ct. 1519 (1969). While the regulation embodied in Rule III does not literally refer to the present underlying statute due to the fact that amendment of the regulations has not kept pace with amendment of the statutes, the Commission has placed an interpretation upon its own regulation that makes the same harmonious and consistent with the present body of statutory law. The intent of the regulation is plain on its face that any party proposing to acquire a contract motor carrier permit by transfer should comply with the appropriate laws as though he were applying for a new permit.

As noted above, statutory law prevails over related regulations in the event of an inconsistency. To do otherwise, would frustrate the legislative intent. If, however, a mechanical approach to statutory construction is taken, as advocated by plaintiffs, the law still provides that the Commission's regulations must incorporate the current statutory criteria.

When a regulation is legislative in character, the rules of interpretation applicable to statutes should be used in determining the meaning of the regulation. *Sutherland Statutory Construction*, 4th Ed., Vol. 1A, Section 31.06—"Administrative Regulations—Interpretation". In *State of North Dakota, ex rel. Public Service Commismission* v. *Montana-Dakota Utilities Co.*, (N. D. 1958), 89 N. W. 2d 94, the court was faced with two inconsistent statutes dealing with procedure on utility rate increases. The court there said:

> " 'When a subsequent enactment covering a field of operation coterminous with a prior statute cannot by any reasonable construction be given effect while the prior law remains in operative existence because of irreconcilable conflict between the two acts, the latest legislative expression prevails, and the prior law yields to the extent of the conflict.' Sutherland Statutory Construction, 3rd Ed., Sec. 2012.
>
> 'The subsequent enactment of a statute which treats a phase of the same general subject matter in a more minute way consequently repeals pro tanto the provisions of the general statute with which it conflicts.'
>
> Sutherland Statutory Construction, 3rd Ed., Sec. 2022; State ex rel. Lofthus v. Langer, 46 N. D. 462, 177 N. W. 408; Hagstrom v. Estherville School Dist. No. 43, 67 N. D. 56, 269 N. W. 93."

The section cited by the North Dakota court in *Sutherland Statutory Construction* provides further that legislative intent is the key to statutory interpretation and

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Specifically, Rule III is now subject to Section 54-6-8 Utah Code Annotated 1953 and not the 1935 laws.

Where a conflict arises between a statute and a corresponding agency regulation, the statute must prevail in order that the legislative purpose will be accomplished. Sutherland Statutory Construction, 4th Edition, Volume 1A, Section 31.02-"Administrative Regulations-Validity" provides:

> "Since the central legislative body is the source of an administrative agency's power, the provisions of the statute will prevail in any case of conflict between a statute and an agency regulation." County of Los Angeles v. State Department of Public Health, 158 Cal. App. 2d 425, 322 P. 2d 968 (1958).

In applying its Rule III to transfers of contract motor carrier permits, the Commission must look to fulfill the legislative purpose and in doing so must consequently apply the criteria as presently set forth in Section 54-6-8 Utah Code Annotated 1953. An administrative agency must look to the statute for its obvious purpose and that purpose is not to be overcome by resort to mechanical rules of construction. Rucker v. Wabash Railroad Company, 418 F. 2d 146 (1969); Rowley v. Public Service Commission et al., supra, at 112 Utah 121.

In interpreting the Commission's regulation as embodied in Rule III, the meaning of the regulation is best determined from the Commission itself. In Barton Truck Line, Inc. v. Public Service Commission, 21 Utah 2d 102, 440 P. 2d 972 (1968), this court said at 21 Utah 2d 105:

> "The one most likely to know what was meant by a given expression is the one who made it. The Public Service Commission used the language, and it should know better than anyone else what was meant."

that courts must strive to satisfy that intent in applying rules of statutory construction.

Crawford, Statutory Construction — Interpretation of Laws, Section 303, provides:

> "Since an amendment becomes a part of the original statute, both must be construed together as if they constituted one enactment, even if the amendment occurs merely by implication. Their provisions should be harmonized, if possible, but where there is irreconcilable conflict, the provisions of the amendement must prevail over those of the original statute on the theory that the former constitutes the last expression of the will of the legislature."

Section 304 of the same treatise provides:

> "The amended statute should also be construed as if it had been originally passed in its amended form, since the amendment becomes a part of the original enactment. * * *"

In *New York, Chicago and St. Louis Railroad Company* v. *Brotherhood of Locomotive Firemen and Enginemen*, 358 F. 2d 464 (1966), the court was faced with a labor dispute in which the Norris-LaGuardia Act and a subsequent public law were inconsistent. There the court stated:

> "A specific act of the nature of Public Law 88-108 is generally held to amend by implication any preceding general statute of the nature of the Norris-LaGuardia Act (29 U. S. C. §101) in

> conflict therewith. Brotherhood of Railroad Trainmen v. Chicago River & Indiana Railroad Co., 353 U. S. 30, 41-42, 77 S. Ct. 635, 1 L. Ed. 2d 622 (1957); Virginian Railway v. System Federation No. 40, 300 U. S. 515, 563, 57 S. Ct. 592, 81 L. Ed. 789 (1937)."

In *Petition for Naturalization of Mirzoeff*, 143 F. Supp. 177 (1956), the court interpreted three statutes enacted at different times dealing with the same subject matter. The latest statute to be enacted, similar to the instant situation, added a new requirement as well as adopting the substance of the prior law. There the court said::

> "* * * The three statutes cover the same subject matter. Thus, to the extent that the 1952 statute adds a new requirement it impliedly amends the earlier statutes. * * *"

In the instant matter, the Commission's Rule III makes reference to the provisions of Chapter 65, *Laws of Utah*, 1953. The reference made is thus to a general body of law and not to a specific statute, although specific statutes within Chapter 65 govern the transfer of contract motor carrier permits. In *Somermeier* v. *District Director of Customs*, 448 F. 2d 1243 (1971), the court was confronted with a situation where the California law adopted the appropriate provisions of federal law by reference. The issue was whether the court should apply the federal law at the time the California statute was enacted or the federal law as it was subsequently changed. There the court said:

> Under California law, when, by statute, reference is made to general law rather than to a specific statute, the adopted laws are taken not only in their contemporary form but also as they may be changed from time to time. * * *"

The statutory history of the subject Utah legislation, as set forth above, indicates that in 1933 adequacy of existing transportation facilities was one of several criteria that the Commission was to consider in granting or transferring contract motor carrier permits. In the 1935 revisions of this body of law, this criterion was apparently inadvertently omitted because the same was reinstituted by the Legislature in 1945 and has been carried forward into subsequent Utah statutes. In *Jefferson County Teachers Ass'n* v. *Board of Education of Jefferson County*, (Ky., 1971), 463 S. W. 2d 627, Cert. den., 404 U. S. 865, the court was faced with a situation remarkably similar to the Utah statutory history in the instant matter. The Kentucky case was concerned with the right of teachers to strike. In 1940, the Kentucky Legislature enacted a statute governing employer-employee relations. The 1940 act set forth the right to collectively bargain, strike and so forth, but the 1940 act contained an express exclusion relating to employees of federal and state bodies and political subdivisions and agenciese. In 1942 the Kentucky statutes were completely revised and the subject exclusion was carried forward into certain statutory provisions governing wages and hours but not into the subject Department of Labor statute. The court there held that the legislative policy had

been expressed in the earlier 1940 act and that the exclusion with respect to strikes by public employees must be read into the subsequent "Department of Labor" statute. There the court said at page 629:

> "The original Act pertaining to employer-employee relations clearly and expressly excluded public employees from the granted right to strike. The apparently inadvertent omission of this exclusion in Chapter 336 when the statutes were revised cannot be held to have changed the legislative policy and the law. Therefore appellants cannot properly claim the legislature has granted them such right, and their principal contention must fall."

In the instant matter, not only was the legislative policy with respect to the adequacy of existing transportation facilities expressed in 1933, but when the omission was discovered, the Legislature took pains to correct the omission in 1945 and carried the corrected statute forward into the 1953 Code. Clearly, the criteria to be considered by the Commission in applying its Rule III with respect to the transfer of contract carrier permits is the legislative policy as set forth in the 1953 Utah Code, which latter Code contains the same basic criteria as originally established by the Utah Legislature in 1933. To do otherwise, would do violence to the legislative intent which is clearly expressed and would contravene existing case law. The Commission properly applied its regulations and the law to the case before it.

In its decision, the Commission also concluded that

the plaintiffs did not meet their burden of proof with respect to demonstrating that "the grant of the application will not be detrimental to the best interests of the people of the State of Utah and/or to the localities to be served" (R. 56). This criterion necessarily embodies an examination of the adequacy of existing transportation facilities. In 1933, the Legislature set forth the purpose of its act. Section 34, Chapter 53, *Laws of Utah*, 1933, provides:

> *The business of operating as a motor carrier for hire along the highways of this state is declared to be a business affected with the public interest.* The rapid increase of motor carrier traffic, and the fact that under existing law many motor vehicles are not effectively regulated, have increased the dangers and hazards on public highways and make it imperative that more stringent regulation should be employed, to the end that the highways may be rendered safer for the use of the general public; that the wear of such highways may be reduced; that discrimination in rates charged may be eliminated; that the use of the highways for the transportation by motor vehicles for hire may be restricted to the extent required by the necessity of the general public, and that the various transportation agencies of the state may be adjusted and correlated *so that public highways may serve the best interest of the general public.*" (Emphasis added.)

Through Section 34 the Legislature has indicated that the best interests of the people of the State of Utah and/or the localities to be served necessarily incorpor-

ates the existing transportation industry as well as highway utilization by all public sectors. In the hearing on July 26, 1974, the parties stipulated that the protesting motor carriers who constitute the substantial part of the motor carrier industry within the area authorized to be served by Mary A. Murphy would be materially and adversely affected if Mary A. Murphy's contract motor carrier permit were transferred. The harm to be encountered by transfer of the permit was established in the record and perceived by the Commission. This was a necessary element in its decision in concluding that transfer of the permit was not in the best interests of the people of the State of Utah and/or the localities to be served.

The plaintiffs suggest that the court should consider the rationale set forth in *Collett, et al.* v. *Public Service Commission, et al.*, 116 Utah 413, 211 P. 2d 195 (1949), and *Morris* v. *Public Service Commission*, 7 Utah 2d 167, 321 P. 2d 644 (1958). Plaintiffs admit that the operating authority transferred in those cases in each instance was a certificate of public convenience and necessity of a common motor carrier and in no way involved contract motor carrier permits. Plaintiffs urge that logic compels that the rule relating to transfer of common motor carrier certificates be applied to the transfer of contract motor carrier permits. They do this even though the Commission's rules are directly to the contrary.

The Commission has historically recognized the distinction between common and contract motor carriers

and has provided separate sets of rules to govern the transfer of their authorities. Rule III of the Commission as discussed above sets forth the criteria for the transfer of contract motor carrier permits. The regulation governing the transfer of common motor carrier certificates is set forth in the Commission's *Motor Carrier Rules and Regulations No.* 3 as its Rule II. The burden of proof with respect to the two types of motor carriers is substantially different. Rule II provides in pertinent part:

> "A joint application shall be filed by the persons involved which application shall request authority for the one person to discontinue operations as a motor carrier and for the other person to assume and take over said operations as a motor carrier. The person desiring to assume said operating rights shall comply with the provisions of Chapter 65, Laws of Utah, 1935, as in filing for a ne wcertificate of convenience and necessity *except that said person will not be required to prove convenience and necessity.*" (Emphasis added.)

The distinction between common and contract motor carriers has historically been recognized by the Commission and also by this court. In *Rio Grande Motor Way, Inc.* v. *Public Service Commission*, 21 Utah 2d 377, 445 P. 2d 990 (1968), this court said at 21 Utah 2d 380:

> "The first comprehensive act was passed by the legislature in 1933 (Chap. 53, S. L. U. 1933). Article II thereof relates to the issuance of certificates of convenience and necessity and the regulation of common motor carriers; while Arti-

> cle III deals separately with contract motor carriers and the issuance of operating permits to them. This separate recognition and treatment of these different types of service has been continued in all subsequent enactments. * * *"

Also see *McCarthy, et al.* v. *Public Service Commission, et al.*, 111 Utah 489, 184 P. 2d 220 (1947), at 111 Utah 494. Different standards must be applied to contract motor carriers than common motor carriers because of the differing types of service performed by them. The distinguishing characteristic of the common carrier is that it transports for all persons who request such service where as the contract carrier renders a transportation service only to specific parties with whom it has contracts to do so. *Realty Purchasing Company* v. *Public Service Commission*, 9 Utah 2d 375, 345 P. 2d 606 (1959). Because the contract motor carrier serves only those with whom it has contracts, the Commission must be in a position to determine whether or not the transfer of the permit is supported by the contracting shippers and whether the transfer is in the public interest. The rationale for requiring a different burden of proof from the contract motor carrier than the common motor carrier is set forth in *Ratner—Control; Emery Transportation Co.—Purchase—Gordon*, 57 M. C. C. 385 (1951). In the *Ratner* case, Emery Transportation Company, a contract motor carrier, sought to purchase the operating authority of Lawrence Gordon, also a contract motor carrier. The Commission denied the proposed transfer of the permit and at page 393 stated its rationale:

"In *Baggett Transp. Co.—Purchase—De Tar Distributing Co.*, 56 M. C. C. 563, where the vendor, a contract carrier, had discontinued service, we stated:

The traffic formerly transported by vendor has been absorbed, in part, by competing carriers, with the remainder being transported by the shipper for its own account as a private carrier. There is no evidence of record that any shipper has expressed a need for the service proposed by vendee, that existing service in vendor's territory is inadequate or unsatisfactory, or that existing carriers could not, if called upon to do so, absorb the traffic now being transported by Atlas in private carriage. There is no evidence showing that vendor's discontinuance of operations has in any way inconvenienced its shipper, or other shippers formerly served by it. The conclusion is warranted that present carriers are satisfactorily meeting the shipper's needs for contract-carrier service. The circumstance that vendor's discontinuance of service occurred without the knowledge or consent of vendee, has no bearing on the question whether the purchase would be consistent with the public interest. *The facts here are similar to those in numerous other proceedings where it has been found that it would not be consistent with the public interest to permit the acquisition and reinstitution of common-carrier operations, which had been discontinued by the vendor, in the absence of evidence indicating a need for resumption of service. Fish Transport Co., Inc.—Purchase Aiello*, 50 M. C. C. 729. *The fact that contract-carrier rights are involved here does not, of itself, warrant approval in the absence of similar evidence.*

"Gordon, as indicated, served only one shipper, Food Fair Stores, In. The traffic which he formerly handled for that concern is now transported partly in private carriage by the shipper and partly in common carriage by certain motor-carrier protestants. *The transaction involves the purchase of bare operating rights, with no going-concern value or good will. Gordon has ceased to be a competitiue factor.* * * *" (Emphasis added.)

In keeping within the present body of statutory law, the Commission properly concluded:

"* * * Critical to the transfer of a contract carrier permit is the introduction by applicant of evidence that the grant of the application will not be detrimental to the best interests of the people of the State of Utah and/or to the localities to be served. Additionally, applicants must demonstrate that existing transportation facilities do not provide adequate or reasonable service. Applicants have not met their burden of proof and the transfer of the contract carrier permit from Mary A. Murphy, dba Alex Pickering Transfer, to Pickering Transfer Company, Inc., should be denied." (Vol. 1, p. 56.)

POINT II.

PLAINTIFFS HAVE FAILED TO ESTABLISH THE NATURE OF THE TRANSACTION UNDERLYING THE APPLICATION AND THE PROPOSED TRANSFEREE HAS FAILED TO DEMONSTRATE ITS FITNESS

AND ABILITY TO CONDUCT THE OPERATION.

The Commission concluded in its Order under date of October 30, 1974, that the transferee had not established that it was ready, willing and able to operate the certificate and permit which it proposed to acquire from Mary A. Murphy. The Commission also concluded that there was no agreement between the transferor and the transferee pursuant to which it could find that the terms of the proposed transaction were consistent with the public interest (R. 56).

In a transfer proceeding, the proposed transferee must establish that it has the financial ability, experience, and capability to carry on the business of the transferror and that it is fit to do so. In the instant matter, all the financial data submitted by the transferee was that of the transferror, although it was stipulated by protestants that certain aspects of that data could be considered the pro forma statements of the transferee (R. 197). No actual financial data was ever presented on behalf of the transferee. The fitness of the proposed transferee was placed in issue and not satisfactorily explained by the transferee (R. 185-186).

No contract was offered in evidence demonstrating that any agreement had been reached between the transferror and the transferee. The only agreement offered was a contract of purchase between Max W. Young and Mary A. Murphy, which contract was identified as Ex-

hibit 4 (R. 5-10). Exhibit 4 also raised the issue of the real party in interest and whether the plaintiff, Pickering Transfer Company, Inc. was in fact the proposed transferee. That issue was not resolved on the record.

The Commission had no evidence before it whatsoever from which it could conclude that the applicant had the financial ability, experience, fitness and capability to carry on the business, *if any*, conducted by Mary A. Murphy. Further, there was no contract of purchase between the plaintiffs from which the Commission could ascertain the terms of their agreement, if any, and their intentions with respect to operating and financing the proposed business.

CONCLUSION

In the instant matter, the Commission properly applied its regulations and the law to exercise the responsibility imposed on it by the Legislature. There is ample basis in the record to support the Commission's findings and conclusions and the Commission's action is not arbitrary or capricious. It is a wise decision supported by the record and should be sustained.

Respectfully submitted,

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